

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re

No. C 99-3802 CRB

GARY A. BOYD, and
KAREN M. BOYD,

MEMORANDUM AND ORDER

Debtors.

EDWARD F. TOWERS, TRUSTEE,

Plaintiff/Appellant,

v.

GARY A. BOYD and KAREN M. BOYD,

Defendants/Appellees.

U.S. Trustee Edward F. Towers appeals the bankruptcy court's dismissal of his complaint. After carefully considering the papers filed by the parties, and having had the benefit of oral argument, the bankruptcy court is AFFIRMED.

BACKGROUND

Gary and Karen Boyd ("the Boyds"), debtors to a bankruptcy estate for which Edward F. Towers ("Towers") served as trustee,¹ filed a joint voluntary Chapter 7 bankruptcy petition in 1995. In their sworn schedules, the Boyds failed to disclose the fact that they held a cause of action against Home Depot for injuries caused in an earlier accident. As a result of this nondisclosure, the court closed the case as a no-asset case on

1 February 7, 1996. After the court closed the case, the Boyds pursued their cause of action
2 against Home Depot, and recovered \$700,000 in a settlement.

3 When Towers learned about the settlement in early 1998, he reopened the case in
4 bankruptcy court. The Boyds then filed an amendment to their schedules, alleging that their
5 personal injury settlement was exempt from recovery by Towers. In response, Towers
6 prepared an objection to the claimed exemption, which he promptly served upon the Boyds,
7 but failed to file with the court within the time allotted by Federal Rules of Bankruptcy
8 Procedure.

9 Subsequently, Towers filed a complaint in bankruptcy court seeking denial of the
10 exemption, recovery of the \$700,000, and revocation of the Boyds' discharge. Bankruptcy
11 Judge Dennis Montali dismissed the complaint, concluding that Towers' claims were time-
12 barred. Towers now appeals, alleging that the bankruptcy court erred in the following
13 respects: 1) holding that U.S. Supreme Court case Taylor v. Freeland & Kronz, 503 U.S. 638
14 (1992), requires timely filing of an objection to an exemption where actual notice of the
15 objection was given; 2) holding that Bankruptcy Code section 105 does not provide an
16 independent basis for objecting to a claim of exemption; 3) finding that the statute of
17 limitations in Bankruptcy Code section 727 may not be tolled by a debtor's fraud; and 4)
18 allowing the debtors to amend their bankruptcy schedules by claiming the personal injury
19 exemption.

20 STANDARD OF REVIEW

21 The district court's standard of review over a bankruptcy court's decision is identical
22 to the standard used by circuit courts reviewing district court decisions. See Ford v. Baroff
23 (In re Baroff), 105 F.3d 439, 441 (9th Cir. 1997). Thus, the district court reviews the
24 bankruptcy court's factual findings for clear error and its conclusions of law de novo. See
25 Diamant v. Kasparian (In re Southern Cal. Plastics, Inc.), 165 F.3d 1243, 1245 (9th Cir.
26 1999). Since the scope of the current appeal is limited to the bankruptcy court's grant of a
27 motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), it is a matter of law, and a
28 de novo standard of review will be applied. See Borough v. Rogstad (In re Rogstad), 126

1 F.3d 1224, 1228 (9th Cir. 1997).

2 DISCUSSION

3 Towers makes two arguments as to why the late objection should be allowed, and
4 two arguments as to why the debtors' alleged fraud creates an opening for the trustee to
5 administer the personal injury assets. All four of these arguments are unpersuasive. The
6 Court affirms the bankruptcy court's decision to grant the Boyds' motion to dismiss because
7 Towers' claims are time-barred.

8 **I. THE BANKRUPTCY COURT CORRECTLY HELD THAT TRUSTEE'S** 9 **OBJECTION TO DEBTORS' EXEMPTION WAS TIME-BARRED.**

10 Towers first argues that the bankruptcy court erred in holding that U.S. Supreme
11 Court case Taylor v. Freeland & Kronz, 503 U.S. 638 (1992), requires timely filing of an
12 objection to a claim of exemption where actual notice of the objection was given.
13 Alternatively, he argues that the Court should use its equitable powers under Bankruptcy
14 Code section 105 to cure his failure to file a timely objection.

15 **A. Overview of Bankruptcy Code, Bankruptcy Rules, and Case Law** 16 **Regarding Objections to Exemptions**

17 The requirements for exempting property from a debtor's estate and for filing
18 objections to such exemptions are governed by the bankruptcy code and rules. Bankruptcy
19 Code section 522(l) requires debtors to list any property exempted under federal or state law,
20 and Rule 4003(a) requires the exemptions to be listed on a schedule of assets pursuant to
21 Rule 1007. The Boyds amended their joint bankruptcy schedule under California Code of
22 Civil Procedure section 704.140(a), which exempts a cause of action for personal injury.
23 See Judge Montali's Memorandum Decision of May 18, 1999 ("Mem. Dec.") at 8 n.3. A
24 trustee has 30 days to file an objection to an exemption claimed by a debtor on his or her
25 amended bankruptcy schedule. Fed. R. Bankr. P. 4003(b). Absent an objection, the claimed
26 property will be exempted from the estate. 11 U.S.C. § 522(l).

27 The U.S. Supreme Court articulated a rule of strict interpretation for the timeliness of
28 Rule 4003(b) objections in Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). In Taylor, the
Court held that a trustee must object to a claimed exemption within the 30-day time limit,

1 and that if a trustee fails to object within 30 days, the property is rendered exempt and the
2 trustee is barred from contesting the validity of the exemption. 503 U.S. at 642. The time
3 limit applies regardless of the merits of the exemption. Id. The debtor in Taylor had
4 claimed the expected proceeds from a pending lawsuit as exempt property, and the trustee
5 failed to object to the exemption. Id. at 640-41. After the debtor settled her lawsuit, the
6 trustee sought to have the money turned over to the debtor's bankruptcy estate. Id. at 641.
7 Although the bankruptcy court and the district court held that the debtor had no statutory
8 basis for claiming the entire settlement exempt, the Supreme Court found that the property
9 was exempt because the trustee failed to object within the 30-day time limit. Id. at 640-42.
10 The Supreme Court concluded that the trustee could not contest the exemption, whether or
11 not the debtor "had a colorable statutory basis for claiming it." Id. at 643-44.

12 **B. Actual Notice Does Not Satisfy the Filing Requirement Under**
13 **Bankruptcy Rule 4003**

14 Towers does not deny that Taylor controls the determination of the timeliness of his
15 objection to the exemption. Instead, he argues that under the bright-line rule in Taylor,
16 actual notice of a trustee's intent to file an objection is sufficient to comply with Rule
17 4003(b), even if the objection is not filed with the court within 30 days. He asserts that the
18 bankruptcy court erred in holding that an objection must be filed with the bankruptcy court
19 within the 30-day time limit where actual notice of the objection has been given to debtors.

20 Towers argues that the policy underlying Rule 4003(b) is to provide timely notice to
21 debtors that their exemption will be contested. He argues that a trustee or creditor is not
22 required to abide by the literal meaning of the language in Rule 4003(b) that "[t]he trustee or
23 any creditor may *file* objections to the list of property claimed as exempt within 30 days after
24 . . . the filing of any amendment to the list or supplemental schedules" (emphasis
25 added). Towers' argument has no support. Several cases have rejected the argument that
26 actual notice can act as a substitute for a filing with the court under Rule 4003(b). See
27 Taylor, 503 U.S. at 640-42; Clark v. Kazi (In re Kazi), 985 F.2d 318, 321-22 (7th Cir.
28 1993); Canino v. Bleau (In re Canino), 185 B.R. 584, 591-92 (B.A.P. 9th Cir. 1995).

1 In Taylor, even though the trustee notified debtors that he considered the potential
2 proceeds from debtor's lawsuit to be property of the bankruptcy estate, the Supreme Court
3 found that failure to file a timely objection foreclosed the challenge. 503 U.S. at 640-42. In
4 examining whether actual notice was sufficient, the Seventh Circuit concluded that Taylor
5 "forecloses the trustee's 'actual notice' argument." In re Kazi, 985 F.2d at 321-22.

6 None of the cases to which Towers cites hold that actual notice substitutes for filing
7 an objection with the court *in some form*. See Spenler v. Siegel (In re Spenler), 212 B.R.
8 625, 630 (B.A.P. 9th Cir.1997) (finding that Rule 4003(b) was meant to provide debtor with
9 timely notice, and that trustee had filed an objection to debtor's exemption); Havas Leasing
10 Co. v. Breen (In re Breen), 123 B.R. 357, 360 (B.A.P. 9th Cir. 1991) (trustee's timely
11 motion "in essence" objected to debtor's claim); Young v. Adler (In re Young), 806 F.2d
12 1303, 1305 (5th Cir. 1987) (trustee "effectively" complied with the rule by objecting in a
13 motion); Applebee v. Brawn (In re Brawn), 138 B.R. 327, 333 (Bankr. D. Me. 1992)
14 (creditors' response to debtors' motion to avoid lien "manifested" their intent to object).
15 These cases negate Towers' actual notice argument. The bankruptcy court was correct in
16 holding that actual notice was insufficient to comply with Rule 4003.²

17 **C. Towers' Failure to File A Timely Objection Cannot be Cured by Using**
18 **the Court's Equitable Powers Under Bankruptcy Code Section 105**

19 Second, Towers argues that the bankruptcy court should have found an independent
20 basis for objecting to an exemption under Bankruptcy Code section 105. Bankruptcy Code
21 section 105(a) states:

22 The court may issue any order, process, or judgment that is
23 necessary or appropriate to carry out the provisions of this
24 title. No provision of this title providing for the raising of
25 an issue by a party in interest shall be construed to preclude
the court from, sua sponte, taking any action or making
any determination necessary or appropriate to enforce or
implement court orders or rules, or to prevent an abuse of
process.

26 Towers argues that the bankruptcy court should have used its equitable powers under section
27 105 to permit his late objection. Towers cites two reasons why the court should have used
28 its equitable discretion: 1) the debtors had actual notice of Towers' intent to file, so the

1 official date of Towers' filing is unimportant; and 2) the debtors acted in bad faith in
2 concealing their assets. Both arguments fail.

3 **1. Actual Notice**

4 As the bankruptcy court noted, section 105 gives courts equitable powers, but
5 "Section 105 does not authorize relief inconsistent with more specific law." Mem. Dec. at 6,
6 citing Seaport Automotive Warehouse, Inc. v. Rohnert Park Auto Parts, Inc. (In re Rohnert
7 Park Auto Parts, Inc.), 113 B.R. 610, 615 (B.A.P. 9th Cir. 1990). The bankruptcy rules
8 contain specific limitations on the right to object to a debtor's claimed exemption. First,
9 Rule 4003(b) requires a trustee or creditor to file an objection within 30 days of an amended
10 exemption, and the Supreme Court construed this rule strictly in Taylor. In another
11 indication that Rule 4003(b)'s time limit must be construed strictly, Rule 9006(b) usually
12 allows a court to enlarge the time limit prescribed in bankruptcy rules if failure to meet a
13 deadline was the result of "excusable neglect." However, Rule 9006(b)(3) explicitly limits a
14 court's ability to take such action under Rule 4003(b). See Fed. R. Bankr. P. 9006. These
15 provisions exemplify the importance that the bankruptcy rules place on the time-limited
16 nature of the right to object. Given such clear directives, the Court will not use its equitable
17 powers to achieve a contradictory result.

18 **2. Bad Faith**

19 Towers also argues that Taylor "did not preclude the Section 105 argument where
20 bad faith or fraud has been committed." Although Taylor left open the issue of whether
21 section 105 can be used to disallow exemptions claimed in bad faith, this Court will not
22 create a "bad faith exception" to Rule 4003(b)'s filing requirements. See Taylor, 503 U.S. at
23 645-46. As a leading treatise notes, since Taylor, "most courts have held that section 105
24 cannot be used as a basis for any implied good faith exception to the time limits set forth in
25 the Bankruptcy Code and Rules with respect to the debtor's list of exemptions." 2 Collier
26 on Bankruptcy ¶ 105.04(6)(a) (15th ed. 1999).

27 To the Court's knowledge, no other court has used section 105 as a vehicle for
28 circumventing the time limit where the trustee knew about a bad faith exemption but failed

1 to file an objection in time, although several courts have discussed such a possibility. See In
2 re Canino, 185 B.R. at 594 and Heintz v. Carey (In re Heintz), 198 B.R. 581, 588 (B.A.P.
3 9th Cir. 1996) (both declining to reach the section 105 issue). The only post-Taylor case
4 Towers cites in support of his section 105 argument is In re Montanez, 233 B.R. 791 (Bankr.
5 E.D. Mich. 1999), in which the court found that “unique circumstances” warranted exercise
6 of discretion under section 105(a) to allow an untimely objection. See In re Montanez, 233
7 B.R. at 797-98 (finding abuse of process where debtor claimed an exemption, but denied any
8 interest in the property). However, in In re Montanez, the court noted that “this is not a case
9 of the trustee ‘missing’ the deadline; rather it is a case of the debtor concealing information
10 crucial to the administration of the estate.” Id. at 798. Towers’ reliance on this case is
11 misguided because he cannot argue that the amended exemption concealed the lawsuit -- he
12 simply missed the filing deadline. It is noteworthy that the In re Montanez court, writing in
13 April 1999, was “unable to find any case where . . . § 105(a) was applied in this context.”
14 Id. at 797 n.1.

15 D. Conclusion

16 In sum, the bankruptcy court did not err in rejecting Towers’ section 105 claim.
17 Courts should not exercise their equitable discretion in a way that contravenes mandates
18 such as Rule 4003(b). Although Taylor did not foreclose the possibility of using section 105
19 to disallow bad faith exemptions, the Supreme Court held that the bankruptcy rules are not
20 subject to an implied good faith exception. 2 Collier on Bankruptcy ¶ 105.4(6)(a) (15th ed.
21 1999). In light of Taylor and the fact that no other court has used section 105 to find an
22 independent basis for allowing untimely claims on similar facts, the Court affirms the
23 bankruptcy court on this issue. Therefore, Towers’ objection is time-barred both because
24 actual notice is insufficient to comply with Rule 4003, and because section 105 cannot cure
25 the late filing.

26 II. TOWERS DID NOT SEEK TO REVOKE THE DEBTORS’ DISCHARGE 27 WITHIN THE STATUTORY TIME PERIOD FOR DISCHARGE BASED 28 ON FRAUD, SO HIS ADDITIONAL FRAUD ALLEGATIONS ARE PRECLUDED.

Towers alleges that the Boyds “fraudulently secreted” a \$700,000 asset from their

creditors, the trustee, and the bankruptcy court by failing to disclose their personal injury cause of action. He argues that equitable tolling should apply to the time limit for bringing revocation of discharge actions based on fraud, and that the Boyds' amended claim of exemption should be disallowed under the "fraud exception" to debtors' right to amend. The Court concludes that equitable tolling does not apply to such revocation actions, so the discharge stands, rendering Towers' "fraud exception" argument moot.

A. Equitable Tolling Cannot Be Used to Excuse Trustee's Untimely Revocation of Discharge Claim

Towers argues that the bankruptcy court erred in finding that Bankruptcy Code section 727 may not be tolled by debtors' fraud. His two arguments as to why his untimely revocation claim should be permitted are: 1) the equitable tolling doctrine should apply to section 727 because courts have applied it to other sections of the Bankruptcy Code; and 2) section 727's time limits never began to run because the case was never properly closed. Both arguments fail.

1. Overview of Bankruptcy Code, Bankruptcy Rules, and Case Law Pertaining to Towers' Section 727 Arguments

Bankruptcy Code section 727 governs the granting of a debtor's discharge. Section 727(d)(1) permits a trustee to request to revoke the discharge of a case when that discharge is obtained through fraud about which the requesting party did not know before the discharge was granted. Section 727(d)(2) permits revocation of discharge when a debtor acquired or became entitled to property of the estate that it knowingly and fraudulently failed to report, deliver or surrender to the trustee.

If Towers' factual allegations are true, then he may have had the right to revoke the discharge pursuant to section 727. However, to successfully revoke discharge under section 727, Towers had to meet section 727(e)'s time limits. Bankruptcy Code section 727(e)(1) requires that a trustee must request to revoke discharge under section 727(d)(1) within one year after discharge is granted, and section 727(e)(2) requires that a request under section 727(d)(2) must be made before the later of a) one year after the granting of discharge, and b) the date the case is closed. The Boyds' case was discharged on January 27, 1996, and the

1 case was closed on February 7, 1996. Towers' complaint was not filed until April 21, 1998,
2 well beyond the last possible date on which he could commence a revocation action.

3 In addition to the limiting language in section 727, the bankruptcy rules carefully
4 restrict the time period for bringing revocation actions. Bankruptcy Rule 9024, which
5 makes Federal Rule of Civil Procedure 60 (Relief from Judgment or Order) applicable to
6 bankruptcy proceedings, specifically prohibits application of the civil rule to revocation of
7 discharge claims under section 727(e). The 1983 Advisory Committee Note to Rule 9024
8 emphasizes that pursuant to section 727(e), a complaint to revoke discharge must be filed
9 within one year of discharge or the later of one year after discharge or the date the case is
10 closed. Thus, the bankruptcy code and rules do not contemplate equitable tolling because of
11 a debtor's fraud. The Court is mindful that "equitable tolling is not permissible where it is
12 inconsistent with the text of the relevant statute." Apex Wholesale, Inc. v. Blanchard (In re
13 Blanchard), 241 B.R. 451, 465 (Bankr. S.D. Cal. 1999) (quoting Casciato-Northrup v.
14 Phillips (In re Phillips), 233 B.R. 712 (Bankr. W.D. Tex. 1999); see also Malloy v. Frank (In
15 re Frank), 146 B.R. 851, 854 (Bankr. N.D. Okla. 1992) ("in recent cases the Supreme Court
16 has repeatedly held that the Bankruptcy Code should be interpreted to give effect to the plain
17 meaning of its terms").

18 To the Court's knowledge, the Ninth Circuit has not ruled on equitable tolling under
19 section 727. The majority of courts considering the issue have held that equitable tolling
20 does not excuse untimely initiation of a revocation of discharge. See Rosemary Williams,
21 Creditor's Right to Have Bankruptcy Discharge of Individual Debtor Revoked, Vacated, and
22 Set Aside, 138 A.L.R. Fed. 253 § 12(a) (1997); Davis v. Johnson (In re Johnson), 187 B.R.
23 984, 988 (Bankr. S.D. Cal. 1995). For example, in In re Johnson, the court held that
24 equitable tolling could not be applied correctly to section 727 because if equitable tolling
25 due to fraud stayed the running of those express time periods, it would render section
26 727(e)'s time limits moot. 187 B.R. at 988.

27 Other courts within the Ninth Circuit and beyond have similarly refused to allow
28 equitable tolling to provide an alternate time period for filing revocation claims. See In re

1 Blanchard, 241 B.R. at 464-65; In re Frank, 146 B.R. at 854. Case law and treatises almost
2 unanimously favor reading sections 727(d)(1) and (e)(1) as prohibitive of equitable tolling.
3 See 6 Collier on Bankruptcy ¶ 727.16(1) (15th ed. 1996) (section 727(d)(1) is not a statute
4 of limitations, but “an essential prerequisite to the proceeding. The year undoubtedly beings
5 to run from the date of entry of the order of discharge, and not from discovery of the fraud. .
6 . . The one-year period is not tolled by the debtor’s concealment of assets”); In re Johnson,
7 187 B.R. at 988 (citing five cases from various jurisdictions concluding that equitable tolling
8 does not apply to actions under section 727(d)(1)).

9 Some courts have found that section 727(e)(2), which mandates the time limit for
10 revocations under section 727(d)(2) and 727(d)(3), is not inconsistent with equitable tolling
11 because it applies to situations beyond fraudulent concealment. See In re Phillips, 233 B.R.
12 at 718 n.5; Dwyer v. Peebles (In re Peebles), 224 B.R. 519, 523 (Bankr. D. Mass. 1998).
13 However, the Court is not persuaded that equitable tolling applies to the specific time limit
14 in section 727(e)(2), nor has Towers made the argument that the congressional intent and
15 construction of section 727(d)(2) and (e)(2) warrant such an interpretation.

16 Despite this persuasive authority, Towers urges the Court to expand the equitable
17 tolling doctrine to section 727, following the rationale that some courts have used to apply
18 equitable tolling to time limits in other sections of the bankruptcy code. Although some
19 courts have used the equitable tolling doctrine to sustain untimely avoidance actions under
20 Bankruptcy Code sections 544-549, see, e.g. Olsen v. Zerbetz (In re Olsen), 36 F.3d 71 (9th
21 Cir. 1994), many courts have distinguished between avoidance actions and revocation
22 actions. See In re Blanchard, 241 B.R. at 465; In re Johnson, 187 B.R. at 986-87.

23 The avoidance sections and section 727 are distinct enough to warrant different rules
24 with respect to equitable tolling. Section 727 “is the heart of the fresh start provisions of the
25 bankruptcy law, and must be construed liberally in favor of the debtor and strictly against the
26 objector.” Beauchamp v. Hoose (In re Beauchamp), 236 B.R. 727, 730 (B.A.P. 9th Cir.
27 1999) (citations omitted). By contrast, the purpose of sections 544-549 is to set out the
28 trustee’s powers to avoid liens and transfers that affect the property of the estate. 4 Collier

1 on Bankruptcy ¶ 544.01 (15th ed. 1998). At least one case allowing equitable tolling under
2 these sections distinguished the time limit in section 727, noting that although the avoidance
3 action was not time barred, revocation of discharge was time barred. See Kozman v. Herzig
4 (In re Herzig), 96 B.R. 264, 267 n.1 (B.A.P. 9th Cir. 1989).

5 2. Proper Closing of the Case Under Section 350

6 Towers also argues that the court should adopt the rationale of some courts that have
7 permitted untimely revocation actions by concluding that fraudulent concealment of assets
8 precluded a proper “closing” of a case, as defined by Bankruptcy Code section 350. See
9 Caughey v. Succa (In re Succa), 125 B.R. 168, 171 (Bankr. W.D. Tex. 1991); In re Peebles,
10 224 B.R. at 521. Towers relies largely on In re Succa, which held that the time limit under
11 section 727(e)(2) never commenced to run because fraudulent concealment of an asset
12 precluded full administration of the estate as required for the closing of a case under section
13 350. 125 B.R. at 171.

14 The logic of In re Succa and In re Peebles is not persuasive. The bankruptcy code
15 emphasizes the importance of giving debtors a “fresh start” and uses finality of discharge to
16 effectuate this goal. See H.R. Rep. No. 595, at 384-85 (1977) and S. Rep. No. 989 at 98-99
17 (1978), reprinted in Norton Bankruptcy Law and Practice 2d 798-99 (1999) (section 727);
18 H.R. Rep. No. 595 at 365-66 (1978) and S. Rep. No. 989 at 80 (1978), reprinted in Norton
19 Bankruptcy Law and Practice 2d 592 (section 524). Revocation of discharge is considered
20 an “extraordinary remedy.” Bowman v. Belt Valley Park (In re Bowman), 173 B.R. 922,
21 924 (B.A.P. 9th Cir. 1994). If the Court interpreted the bankruptcy code as Towers
22 suggests, a debtor’s discharge would lose its finality. Under Towers’ proposed system, a
23 trustee or creditor could seek revocation years after the discharge, alleging fraud.
24 Juxtaposing section 350 and section 727 in this way would render the time limits in section
25 727(e) moot. The Court cannot believe that Congress intended such a result.

26 3. Conclusion

27 In sum, there are several reasons why the Court affirms the bankruptcy court’s
28 conclusion that Towers’ revocation claim was time barred. First, according to the specific

1 language of the bankruptcy code and rules, Towers failed to file his complaint in time.
2 Second, most courts have refused to allow equitable tolling in section 727 claims, even in
3 cases where the debtor failed to disclose assets before the case was discharged and closed.
4 Finally, the meaning of “closed” in section 350 should not trump section 727’s time limits.

5 **B. Towers Cannot Object to the Bankruptcy Court’s Allowance of**
6 **the Boyds’ Amendments**

7 The final issue Towers raises on appeal is whether the Boyds should have been
8 allowed to amend their bankruptcy schedules because they fraudulently concealed their
9 personal injury cause of action. He asserts that the bankruptcy court erred in finding that the
10 Boyds had an absolute right to amend their schedules.

11 **1. Overview of the Right to Amend**

12 Federal Rule of Bankruptcy Procedure 1009(a) provides that “[a] voluntary petition,
13 list, schedule, or statement may be amended by the debtor as a matter of course at any time
14 before the case is closed.” As the 1983 Advisory Committee Note accompanying the rule
15 explains, the rule demonstrates a “permissive” approach to amendments. The widely-
16 followed judge-made exception to this statutory rule is that a court may deny a debtor leave
17 to amend if there is a showing of bad faith or prejudice to creditors. Martinson v. Michael
18 (In re Michael), 153 F.3d 526, 529 (9th Cir. 1998) (citing Andermahr v. Barrus (In re
19 Andermahr), 30 B.R. 532, 533 (B.A.P. 9th Cir. 1983)); In re Yonikus, 996 F.2d 866, 872
20 (7th Cir. 1993); 9 Collier on Bankruptcy, ¶ 1009.02(1) (15th ed. 1996).

21 Although couched in terms of “fraud,” Towers’ complaint essentially alleges bad
22 faith. As mentioned earlier, Towers alleges that the Boyds “fraudulently secreted” a
23 \$700,000 asset from their creditors, the trustee, and the bankruptcy court by failing to
24 disclose their personal injury cause of action. Section 522(l) of the Federal Bankruptcy
25 Code requires that the debtor file a list of exempt property. 11 U.S.C. § 522(l); In re
26 Andermahr, 30 B.R. at 533. Concealing an asset by intentionally failing to list it on an asset
27 schedule can be construed as bad faith. See In re Yonikus, 966 F.2d at 866; In re Lundy,
28 216 B.R. 609, 611 (Bankr. E.D. Mich. 1998).

Regardless of any alleged bad faith on the part of the Boyds, the Court concludes that

1 it is unnecessary to reach this issue because the Boyds have already been granted discharge.
2 As discussed, Towers failed to seek revocation within the statutorily-allotted time period, so
3 the discharge stands. He reopened the case to administer the personal injury settlement
4 funds, but failed to object to the claimed exemption in time. Towers has nothing to gain by
5 urging the Court to strike the Boyds' amendment now. He cannot use fraud allegations as a
6 way to obtain authority to administer those funds after the time limit for revoking discharge
7 has expired.

8
9 **2. Debtors Did Not Need the Court's Permission to Amend Their**
10 **Schedules Because the Case Was Reopened**

11 In addition to alleging bad faith grounds for denying the Boyds' amendment, Towers
12 argues that a debtor must get the court's permission before amending schedules in a
13 reopened bankruptcy case. He bases this argument on the language in Rule 1009 that a
14 schedule "may be amended by the debtor as a matter of course at any time *before the case is*
15 *closed.*" Fed. R. Bankr. P. 1009(a) (emphasis added). There is no support for this theory in
16 the case law. Therefore, the bankruptcy court was correct in holding that for the purposes of
17 filing amendments, there is no difference between an open case and a reopened case, and the
18 Boyds did not need the court's permission to amend.

19 **CONCLUSION**

20 In sum, the bankruptcy court did not err in dismissing Towers' complaint. The
21 bankruptcy court correctly held that actual notice does not satisfy the filing requirements of
22 Rule 4003(b), and that section 105 cannot cure the trustee's failure to file a timely objection.
23 Equitable tolling due to debtors' fraud does not apply to the time limits for filing an action to
24 revoke discharge under section 727, nor does it serve any purpose to disallow amendments
25 after debtors have been granted discharge.

26 For the foregoing reasons, the bankruptcy court is AFFIRMED.

27 **IT IS SO ORDERED.**
28

1 Dated: January __, 2000

2 CHARLES R. BREYER
3 UNITED STATES DISTRICT
4 JUDGE

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6
7 ⁰ Mr. Towers has since retired, and has been replaced by successor trustee E.
Lynn Schoenmann.

8 2. As noted above, Towers' counsel failed to comply with a critical deadline for filing
9 objections to claims of exemption. Instead, he created the impression that his objections had
10 been timely filed by serving his objections upon the Boyds within the requisite 30 day time
11 period. Tr. Mot. Dismiss at 45. Once he discovered that his objections had not been filed with
12 the court, he then, without notice to his adversary, belatedly filed with the court. Id. at 43. He
entered into settlement negotiations without disclosing the fact that the objections had not been
timely filed. Id. Only when the Boyds' attorneys checked the docket did they realize that
Towers' counsel had missed the deadline. Id.

13 In oral arguments before this Court and the bankruptcy court, Towers' counsel asserted
14 that informing the Boyds about his failure to comply with the deadline would have constituted
15 malpractice. Tr. Mot. Dismiss at 53. This Court disagrees with such an assertion. It can hardly
16 be suggested that advising one's opponent that counsel has created a false impression can fall
below the standard of care expected of the legal profession. See ABA CENTER FOR
PROFESSIONAL RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (2),
Model Rule 4.1 (1999 ed.). When a lawyer has, as in this case, created a false impression, the
Court believes that he has a duty to correct this misimpression.

17 The logic of counsel's argument suggests that attorneys must scrutinize docket sheets on
18 every filing to see if their adversary has actually submitted the original pleading to the court for
19 filing. This is nonsense. Candor would have dictated that Towers' counsel disclose his late
20 filing to his adversary. Instead he sought to take advantage of his deception in settlement
21 negotiations. This conduct should not be condoned.
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